United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7267

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NORMANDY MANUFACTURING CORP., et al.,

Plaintiffs-Appellants,

—against—

ATLANTIC CONTAINER LINE, LTD. and CIE. GENERALE TRANSATLANTIQUE, SWEDISH AMERICAN LINES and WALLENIUS LINES, d/b/a CARE LINE,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

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This case involves dismissal of an action for loss of container cargo destroyed by a fire aboard the motorvessel Mont Laurier in 1973. The bill of lading carrier was defendant Atlantic Container Line, Ltd. ("ACL"), which for the carriage of ACL container cargo had chartered the Mont Laurier's weather deck from the operator of the vessel, Care Line, a joint venture of the other three defendants. In the Court below Judge KNAPP granted summary judgment dismissing the complaint as to ACL, the carrier, on the ground that the Hague Rules, incorporated in the bills of lading, provide that a carrier is not liable for damage "resulting from fire unless caused by the actual

fault or privity of the carrier." * Point I of this brief discusses the dismissal as to ACL. The dismissal as to the three Care Line defendants, on the basis of *forum non conveniens,* is dealt with in Point II, and Point III concerns the denial of cargo's cross-motion for summary judgment.

POINT I

The Court Below was Right in Summarily Dismissing the Complaint on the Merits as to Defendant ACL.

The parties are in agreement that there is no "genuine issue as to any material fact." ** Summary judgment was therefore proper. The basic issue of law is a simple one: as shown by their first and second issues on appeal, cargo appellants are unwilling to accept the proposition that "breach of what in other connections is held to be a non-delegable duty", does not impose liability on a carrier for damage to cargo *by fire* unless the fire was caused by the actual fault or privity of the carrier, *Earle & Stoddart, Inc.* v. *Ellerman's Wilson Line, Ltd.,* 287 U.S. 420, 427 (1932).

As a space charterer ACL relied completely upon Care Line, the operator of the vessel, for the seaworthy stowage of the Mont Laurier. It is undisputed that the casualty which brought about this litigation resulted from a fire which started in Care Line cargo in the trailer deck and spread throughout the vessel, necessitating her abandonment at sea and resulting in the loss of both the ACL container cargo on the weather deck (belonging to plain-

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* Hague Rules, Article IV, Section 2(b); identical to Section 4(2)(b) of the United States Carriage of Goods by Sea Act, 46 U.S.C. §1304(2)(b).

** Federal Rule of Civil Procedure 56(c).

tiffs) and the underdeck Care Line cargo (which has brought suit against Care Line in Germany). For the purposes of ACL's summary judgment motion, the allegations of unseaworthy stowage must be taken as true.* JUDGE KNAPP held that any negligence on the part of the vessel's operator was not a basis for imposing liability for the fire damage on ACL, the carrier, since ACL had no knowledge of the operator's stowage practices. In his memorandum opinion of September 27, 1974 (A19) Judge KNAPP permitted cargo plaintiffs limited discovery on the issue of whether the relationship between ACL and Care Line was such that any fault of Care Line could be imputed to ACL. Judge KNAPP held that such a relationship was not established by the contract between ACL and Care Line (Memorandum of Understanding dated March 6, 1972, A62), whereby the weather deck space on Care Line vessels was chartered to ACL for the carriage of containers, with the entire operation of the vessels, including the loading and stowing of Care Line cargo below decks and of ACL cargo on the weather deck, being the responsibility of Care Line.

Following extensive discovery by interrogatories, production of documents, and depositions, cargo plaintiffs acknowledged that they were unable to raise any factual issue of ACL having actual knowledge of Care Lines' stowage (A89-90). Cargo argues, however, that as a matter of law Care Lines' knowledge is to be imputed to ACL, as ACL's "actual fault or privity", by reason of the fact that ACL relied upon Care Line for proper stowage.

The stowage on Care Line vessels was under the supervision of Care Lines' cargo coordinator, Captain René Goby, employed by one of the Care Line partners, defen-

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* See *infra*, Point III, as to plaintiffs' summary judgment motion.

dant Cie. General Transatlantique, at its Le Havre container terminal and assigned to handle Care Line vessel stowage. Cargo appellants urge (brief, Point III) that because Captain Goby was of managerial status in Care Line, any negligence or knowledge on his part should be imputed not only to Care Line but also to ACL and that any fault on the part of Capt. Goby in carrying out his Care Line duties should be imputed to ACL because the Care Line defendants are also three of the six participants in ACL, which for the purpose of defendants' summary judgment motions is assumed to be a partnership (A89, A93). Judge KNAPP, however, quite properly recognized that Capt. Goby's actions and knowledge were not attributable to ACL since Capt. Goby was not acting for ACL but for Care Line in connection with the stowage of Care Line vessels* (A94-5). Nor did ACL have constructive (much less *actual*) notice of knowledge imputed to Care Line from Capt. Goby's acts on behalf of Care Line. As a matter of law the ACL partnership cannot be charged with the acts or knowledge of some of its partners in furtherance of the business of a separate joint venture in which they were also engaged, *C.F. Starita Co., Inc.* v. *Comp. Havr. Pen.*, 52 F.2d 58, 61 (2nd Cir., 1931). The rule as to constructive notice to a partnership was summarized by the New York Court of Appeals in *Bienenstok* v. *Ammidown*, 155 N.Y. 47, 61 (1898):

> "The rule of law, which attaches a responsibility to the status of a partnership relation for the acts of a

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* Capt. Goby's only connection with ACL other than in his Care Line capacity, was when ACL's own container vessels loaded or discharged at the Le Have terminal (A94). This case has nothing to do with loading, stowing, or discharging of ACL containers and nothing to do with Le Havre, since the stowage complained of by plaintiffs was of Care Line's non-container cargo loaded in the Mont Laurier's trailer deck at Bremen, Germany (Appellants' brief, pp. 9, 10).

> copartner, within the scope of business transactions, is founded upon a just view of the requirements of public commercial interests. To extend its operation to the extent of imputing the notice or knowledge of a copartner, acquired in transactions outside of the partnership business and which were had for his individual benefit, would be to convert the rule into an instrumentality of injustice. The result would be as illogical, in my opinion, as it would be indefensible upon legal grounds."

The main thrust of appellants' legal argument, however, is based on the propositions that a carrier is ordinarily liable for the fault of anyone—employee, agent, third party—to whom it delegates its duty to exercise due diligence to make the vessel seaworthy and to stow all cargo on the vessel properly (Point I of appellants' brief) and that when a charterer is the carrier, it is just as responsible for failure to exercise due diligence as is a shipowner (Point II). We accept these propositions as correctly stating the law. They are inapplicable to the present case.

Where we part company with appellants is on the question of the delegability of a carrier's obligations *in a fire case.* Appellants, having posed this very question as the first and second issues presented for review (brief, p. 1), *never discuss it.* Appellants' brief does not even cite, much less attempt to distinguish the leading Supreme Court decision, *Earle & Stoddart, supra,* which specifically rejected the contention advanced by cargo—in that case and in the present case—that "the duty of the owner to make the ship seaworthy before starting on her voyage is nondelegable and if the unseaworthiness could have been discovered by due diligence there was necessarily neglect of the vessel-owner" for purposes of the fire defense (287 U.S. at p. 426). In refusing to accept this proposition the Supreme Court stated (p. 429):

> "The courts have been careful not to thwart the purpose of the fire statute by interpreting as 'neglect' of the owners the breach of what in other connections is held to be a non-delegable duty."

In *Consumers Import Co.* v. *Kabushiki Kaisha,* 320 U.S. 249 (1943), in which negligent stowage which caused a fire "was that of a person employed to supervise loading to whom responsibility was properly delegated" (p. 250), the Court cited *Earle & Stoddart* in holding that the shipowner was not liable. Appellants' only reference to this case (brief pp. 18-19) appears to be a quotation from it (appellants' brief, p. 19), but is not. Appellants have apparently missed the point of *Consumers Import:* breach of duties delegated to one who is *not* a managing agent does not deprive the shipowner of the fire defense.

In *A/S J. Ludwig Mowinckels Rederi* v. *Accinanto, Ltd. (The Ocean Liberty),* 199 F.2d 134, 144 (1952; cert. den. 345 U.S. 992), the Court of Appeals for the Fourth Circuit, considering whether improper stowage caused a shipboard fire, relied on *Earle & Stoddart* and *Consumers Import* for the proposition:

> ". . . if there was negligence in the stowage, it was the fault of [the stevedore], whose negligence would not constitute actual fault or privity on the part of the carrier."

These decisions thus establish that if a carrier contracts with another to carry out the carrier's duty to stow cargo in a seaworthy manner, the fault of that other company is not imputed to the carrier *in a fire case.* Cargo appellants in the case at bar refuse to accept that this is the law.

Nor can appellants derive comfort from the fact that in the case at bar the responsibility for stowage was not with

an agent employed to supervise, as in *Consumers Import,* or with a stevedore, as in *Ocean Liberty,* but with the operator of the vessel from which ACL chartered space for the carriage of its containers (in which appellants' cargo was carried). This Court's decisions in *Petition of Skibs A/S Jolund (The Black Gull),* 250 F.2d 777 (1957), 269 F.2d 68 (1959), 273 F.2d 61 (1959), were premised on the view that for purposes of the fire defense the "actual fault and privity" of the owner and charterer were only to be imputed to each from the acts and knowledge of its own managerial employees, not the other's. In the same opinion in which the *charterer* of the Black Gull was denied the protection of the fire defense because the *charterer's* general supervisor of loading was found to have knowledge of the unseaworthy stowage (250 F.2d 784-5), this Court also remanded for findings as to whether a knowledgeable employee of the *shipowner's* corporate managing agent was its managing officer for purposes of the *shipowner's* fire defense (250 F.2d 787-9). Clearly, such inquiry would have been unnecessary if the knowledge of the *charterer's* marine superintendent regarding the stowage were imputable to the *shipowner.*

In an earlier Fire Statute case, *Arkell & Douglas* v. *United States,* 13 F.2d 555 (1926), relied on by appellants (brief, p. 19), this Court reached a similar conclusion with respect to the non-imputation of the fault of even the ship's operating agent to a shipowner. In that case there was "no doubt that the managing and operating agent of the Mallory Transport Lines [the operating agent] had knowledge" of the negligence as to stowage of bunker coal which caught fire. But this Court then proceeded to consider whether "the higher representatives" of the shipowner, the United States, also had knowledge of the failure to shift the coal, and protection of the Fire Statute was

denied because such managerial personnel, "the higher officers", of the United States Shipping Board Emergency Fleet Corporation had in fact been proved to have knowledge:

> "This failure to shift the coal, brought to the attention of these representatives, forms a sufficient basis to predicate negligence on the part of the owner as well as knowledge and privity of the conditions." (13 F.2d at p. 558)

In *Arkell* this Court's criterion for charging a shipowner with knowledge of the cause of the fire was the knowledge of *its own* higher officers, not that of managerial personnel of the company with which the shipowner had contracted to operate the vessel. *Arkell* is illustrative of the care which this Court has taken in order not, in the words of *Earle & Stoddart,* "to thwart the purpose of the fire statute" (287 U.S. at p. 427).

Appellants have cited no authority, and we are aware of none, in support of their contention that the knowledge or fault of a shipowner and its operating agent is imputable to a charterer *in fire cases.* We do not dispute that where a charterer issues a bill of lading, it cannot defend against a claim for cargo damage caused by unseaworthiness, by showing that the responsibility to exercise due diligence to make the ship seaworthy (by stowage or otherwise) was delegated to a qualified person, such as the owner of the vessel, a stevedore, or a repair yard. *But this well-recognized legal principle is inapplicable to fire cases.* In a fire case the carrier is not liable for cargo damage except where the fire was caused by the "actual fault or privity" of one of the carrier's *own* employees of managerial level or of its *own* managing agent. In the present case it is not disputed that no employee of ACL was involved in the stowage of the Mont Laurier and that

Care Line was not a managing agent of ACL. On the contrary, Care Line was the operator of the vessel and chartered space on her to ACL. The Mont Laurier was not ACL's ship, it was Care Line's ship, and ACL was not involved in cargo stowage.

POINT II

Dismissal of the Complaint as against the Care Line Defendants on Grounds of Forum Non Conveniens was Proper.

In the memorandum decision of September 27, 1974 Judge KNAPP noted (A21):

> ". . . all parties agree that defendant Care Line's motion to dismiss on grounds of forum non conveniens should be dependent on the outcome of ACL's summary judgment motion . . ."

Appellants' brief urges the "strong overriding consideration in this case favoring the litigation of related claims in the same tribunal." (p. 25) We agree. If, as we trust will not be the case, the dismissal of the complaint as to ACL were to be reversed, then we do not dispute that the dismissal as to the Care Line defendants should also be reversed. If, as we trust will eventuate, the dismissal as to ACL is affirmed, then there is no reason to retain the suit as against the Care Line defendants here, a forum which has no connection with the factual events. Suit by Care Line cargo against Care Line is presently pending in Germany, where the asserted unseaworthy stowage took place, and Judge KNAPP conditioned the *forum non conveniens* dismissal upon Care Line not interposing a defense of lack of jurisdiction or time-bar in any suit these cargo appellants may bring in Germany (A97-8).

POINT III

Plaintiffs' Motion for Summary Judgment was Properly Denied.

The basis of plaintiffs' cause of action is their assertions that unseaworthy stowage caused the fire and that Captain Goby, Care Line's cargo coordinator, was privy to the circumstances of the stowage. For purposes of *defendants'* motions to dismiss, of course, plaintiffs' assertions must be taken to be true. The situation is entirely different, however, as to *plaintiffs'* informal (see A12) motion for summary judgment: plaintiffs' allegations are vigor ously disputed by defendants. As to plaintiffs' right to recover there are several crucial fact issues raised not only by the pleadings but also in the testimony and documents developed during plaintiffs' discovery (which, being limited to the issue of privity, touched only preliminarily on the merits issues). Even if it were held that defendants are not entitled to dismissal as a matter of law, they are nevertheless entitled to a trial of the factual allegations on which plaintiffs' claim is based. Plaintiffs are not, therefore, entitled to summary judgment.

CONCLUSION

The decision below should be affirmed in all respects.

September 7, 1976

Respectfully submitted,

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Service of 2 copies of this within
Brief is admitted this
7 day of September 1976

ATTORNEYS FOR Plaintiffs-Appellants
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